IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 15

STELLA HUGHES
Petitioner

v.

STATE OF WASHINGTON
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

JOHN GAVIN
410 Miller Building
Yakima, Washington

CHARLES B. WELSH
1112 Robert Bush Drive
South Bend, Washington

ERNEST M. INGRAM
216 Becker Building
Aberdeen, Washington

Attorneys for Petitioner

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In its brief respondent rephrases its question as follows: "Whether state law may supersede and change the federal and common law?"

The basic question remains: "Whether federal law determines title to imperceptible accretions to upland acquired prestatehood?" The secondary and equally important question: "Whether federal law governs

the method of locating the boundary line between upland and state owned tideland?"

Respondent concedes that the common law and federal governs the boundary between upland still owned by the United States and tide lands owned by the State of Washington; that this is a moving boundary coincidental with the line of mean high tide as defined by the U.S. Coast and Geodetic Survey.

From this concession the respondent's conclusion that the State of Washington has and may supersede the federal law lies a tortuous trail. On page 12 of its brief, respondent says: "Borax Ltd. vs. Los Angeles, 296 U.S. 10 (1935) is not authority for a federally created right to future accretions." Various cases are then cited involving land tenure and use of tide lands. Borax disposes of this phase of respondent's argument distinguishing between the limit and extent of a federal patent and the use of adjoining state tidelands as being those riparian rights governed by local law.

On page 28 of its brief respondent advances the statement that the State of Washington is free to change the mean high tide line rule of Borax since federal law incorporates State law in the interpretation of a United States patent where no contrary rule is demanded by the patent itself subject to the condition that state rules do not impair the efficacy of

the grant or use and enjoyment of the property by the grantee. This statement pinpoints the very essence of petitioner's position. Borax explicitly defines a contrary rule which supersedes any state law or interpretation thereof. The latest federal case relying on Borax is not discussed in respondent's brief, to-wit: U.S. vs. Washington, 294 Fed. 2d. 830 (9th Cir. 1961 cert. den.) holding that local law will not determine the limit of the land conveyed under federal patent or the boundary between patentee and the state. That this is a federal question and the principle is the same where the problem is one of determining whether imperceptible accretions go with the upland.

Washougal Trans. Co. vs. Dalles Nav. Co., 27 Wash. 490-496, 68 Pac. 74, (1902) is cited but the salient holding omitted, to-wit: "What title or right passes under a grant of lands made by the United States is a federal question and the judgment of a state supreme court is within the appellate jurisdiction of the federal supreme court."

Respondent in its reply brief to the United States as amicus curiae says on page 7: "Indeed we would suppose that not even Congress could alter the physical limits of property already conveyed under a federal patent." Petitioner agrees and adds that neither may the State of Washington by statute or judicial legislation. On page 9 of this same brief respondent

also says: "Of course, neither the original thirteen states nor the State of Washington can modify the common law retroactively." Seventy-five years later the lower court in Hughes seeks to establish this result.

On page 29-30 of respondent's brief is said: "Borax does indeed make the issue of an appropriate tideland boundary difficult." And on page 33 of the same brief is this statement: "This court's (Borax) refusal to review the California decision and statutes obviously creates problems of interpretation." Respondent may well have stated that Borax and Hughes are irreconcilable and that Hughes creates the problem which had no existence prior thereto. Respondent finally concedes the obvious and asks that Borax be overruled.

This court had an opportunity to reexamine Borax on the State of Washington's petition for Writ of Certiorari in U.S. vs. Washington, 294 Fed. 2d. 830, (9th Cir. 1961) but refused to do so. We are thus faced with a decision of this court that has remained unchallenged since 1935 construed in the Circuit Court of Appeals in 1961 (U.S. vs. Washington). This opinion was written by Justice Hamley, a former justice of the Washington Supreme Court, applying these same principles to uplands in the State of Washington involving gradual accretions.

Respondent ignores Jones vs. Johnston, 18 Howe 150, 155, cited by the Solicitor General which held that alluvion deposited on the shore of Lake Michigan fell within the shifting boundary of the littoral property, which case was cited in Jefferis vs. East Omaha Land Co., 134 U.S. 178, holding "A shifting water line is just as fixed a boundary in the eye of the law as a permanent object such as a street or wall." [1]

Petitioner's position in brief is that the limit and extent of her patented property and the method of ascertaining the boundary between her upland and state owned tideland is governed by federal law and the Borax and U.S. vs. Washington are dispositive of the question.

Nevertheless respondent dwells at some length upon the proposition that the Washington Constitution, statutes and decisions have established a fixed boundary line and defined the same as the vegetation line as of 1889, date of statehood, to which we make the following comments:

The Washington Territorial Code of 1881 adopted the common law and this has been carried into the present Code, R.C.W. 4.04.010.

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[1] The Oxford English Dictionary defines alluvion as a formation of new land by the slow and imperceptible action of flowing waters.

Washington Constitution Article XVII, Section 1 reads as follows:

> "The State of Washington asserts its ownership to the beds and shore of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; PROVIDED, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

This constitutional provision was construed in Ghione vs. State, 26 Wash. 2d. 635, 175 Pac. 2d. 955, (1946) stating on page 648: "These authorities are sufficient to indicate that Article XVII, Sec. 1, conforms to the general principles of American law relating to control by the state over the beds and shores of its navigable waters, and is not necessarily inconsistent with the established rule that water boundaries vary with the water line." And held "Any shifting of that line by gradual and imperceptible change whether by reliction or accretion results in a corresponding shift in the boundary line." The Washington court in Hughes did not overrule this case, but attempted to distinguish the same on the basis that the former case applied only to navigable rivers, so that we now have two cases in the State of Washington construing this constitutional provision to have diverse results.

We are asked therefore to distingush between navigable waters and navigable rivers in a constitutional provision connecting both. The basis for the distinction does not appear.

Respondent refers to certain Washington statutes, to-wit: Ch. 105 and 110, Laws 1901, both of which contain the provision defining the shore and beach "as now are or hereafter may be." Also the laws of 1889 Ch. 83 as reinacted in Laws of 1927, Ch. 255, which are construed in the Ghione case[2] as relating to accretions situated below the line of ordinary high tide and further to apply to such accretions only after such tidelands have been sold by the state. Also referred to are the laws of 1929 Ch. 78, which authorizes the sale of certain lands "bounded by the line of ordinary high tide as the same is now located or as it may hereafter exist." These statutory provisions can only refer to a moving boundary line.

The Williams Fishing Company cases (Williams Fishing Co. vs. Savidge, 152 Wash. 165, 277 Pac. 459; 155 Wash. 443, 284 Pac. 744) are admittedly confusing, nevertheless, are restricted to tidelands and the final opinion states that the highway reservation had a southern boundary which changed according to the line of ordinary high tide.

Eisenbach vs. Hatfield, 2 Wash. 236, 26 Pac. 539,

[2] Ghione vs. State, 26 Wash. 2d. 635, 175 Pac. 2d 955 (1946).

(1891) contrary to respondent's interpretation does not hold that the upland owner had no right to future accretions but merely held that an upland owner could not prevent improvements on state owned tidelands.

Washougal Trans. Co. vs. Dalles etc. Nav. Co., 27 Wash. 490, 68 Pac. 74, (1902) also held that the effect of a federal patent is governed by federal law and extends to the actual high water line as the true boundary.

Other Washington cases lend no support to respondent's theory of a fixed boundary line and the line of vegetation as establishing that line. Cited are Shelton Logging Co. vs. Gosser, 26 Wash. 126, 66 Pac. 151, and Harkins vs. Del Pozzi, 50 Wash. 2d. 237, 310 Pac. 2d 532. In Harkins the line of mean high tide prior to 1910 could not be established and the later line of ordinary high tide as established by the evidence was not in issue. Therefore the court's holding that the line of ordinary high tide was the vegetation line was dicta. And in support of its dicta cites an Idaho case which involved a non-tidal lake, where the line of vegetation is a practical and unchanging line in the absence of the ebb and flow of the tide.

In Shelton Logging Co. the court did not define the line of "mean high tide."

Respondent also relies on the case of San Francisco vs. LeRoy, 138 U.S. 656, (1891) as establishing the line

of vegetation as the boundary line between uplands and tidelands. This statement by that court was dicta since the court found that no tide lands existed, but did say on page 672: "The duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons — as successor to the Pueblo were superior to any subsequently acquired rights or claims of the State of California." Here the Solicitor General representing the United States seeks to protect a grant made through its sovereign power prior to any subsequently acquired rights of the State of Washington. Petitioner claims a vested right even existing under the proviso of the Washington constitution Art. XVII, Sec. 1:

> "PROVIDED that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

On page 11 of respondent's brief in reference to the Hughes case[3] appears the following: "The court rejected the line of mean high tide of the U.S. Coast and Geodetic Survey — and instead approved the past markings of the upper limits (tidelands) by the State Commissioner of Public Lands on the basis of the line of vegetation," and assumes that Mrs. Hughes shares this analysis. To the contrary Mrs. Hughes can only

[3] 67 Wash. 2d. 799; 410 Pac. 2d. 20.

follow the inconsistencies of the Hughes opinion with no understanding of that court's attempted correlation between a theoretical unlocated vegetation line of 1889 and a line of mean high tide the definition of which follows no known theory or principle either engineering or judicial. Mrs. Hughes fully understands that the result of the Hughes opinion gives her land to the State of Washington and the use and sale thereof to its various state agencies and determines the date of taking as of seventy-five years after the event and more than one hundred years after the date of her predecessor's patent.

Ironically, in spite of what respondent says has been the determination of the Commissioner of Public Lands, to-wit: a fixed boundary line as of 1889, that Commissioner has sold thousands of acres of ocean frontage in Grays Harbor County, the western or seaward boundary being described as "lying above the line of ordinary high tide as this same is now located or as it may hereafter exist." This of course is a clear description of a moving boundary line.

In conclusion we can only repeat a statement by Justice Hill in his dissenting opinion in the Hughes case, "To arrive at the result the state desires (and

majority approve), a new, circuitous and rather devious route, rarely explored must be followed."

It is respectfully submitted that the judgment of the court below should be reversed.

JOHN GAVIN
410 Miller Building
Yakima, Washington

CHARLES B. WELSH
1112 Robert Bush Drive
South Bend, Washington

ERNEST M. INGRAM
216 Becker Building
Aberdeen, Washington

Attorneys for Petitioner